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FILED
UTAH APPELLATE COURTS
MAR 17 2008

Attorneys for Respondent State of Utah

IN THE UTAH SUPREME COURT

WANDA EILEEN BARZEE, : REQUEST FOR ORAL ARGUMENT
Petitioner, : HEARING ON PETITION FOR
: EXTRAORDINARY RELIEF

v. :

HONORABLE JUDITH ATHERTON, : Case No. 20080197-SC
Respondent. :

Pursuant to rule 19(d), Utah Rules of Appellate Procedure, and rule 65B(d)(3), Utah Rules of Civil Procedure, Respondent State of Utah requests an oral argument hearing on the earliest available date before the full Court on the merits of Barzee's Petition for Extraordinary Relief. This motion addresses only the State's request for a hearing. Contemporaneous with the filing of this motion, the State is separately filing a response addressing the merits of the petition.

The grounds for the request for hearing are two-fold: (1) the State has a substantial interest in preventing further delays in restoring Barzee's competency and in proceeding to trial on multiple first-degree felony charges; and (2) notwithstanding the express provisions of rule 8A, Utah Rules of Appellate Procedure, applicable under rule 19(c), the State was given no opportunity to assert these interests before the issuance of the provisional grant of Barzee's petition.

In asserting that appellate rules were violated, the State does not believe or suggest that Barzee's counsel proceeded in bad faith. Nevertheless, the following facts establish that the State was not properly served with the petition and was not granted an opportunity to respond or be heard before the petition was provisionally granted.

1. On December 14, 2007, a majority of this Court affirmed the trial court's June 21, 2006, order authorizing the involuntary medication of Barzee. *See State v. Barzee*, 2007 UT 95, 177 P.3d 48. Throughout the appellate process, the undersigned counsel, a member of the Appeals Division of the Attorney General's Office, was the attorney of record for the State of Utah.

2. On January 25, 2008, the case was remitted to the district court. During the 42 days between the issuance of the opinion and the issuance of the remittitur, Barzee did not move for a "stay or supersedeas of the remittitur or an injunction pending application for review to the United States Supreme Court" as expressly provided in rule 36(b), Utah Rules of Appellate Procedure.

3. On February 8, 2008, the trial court, consistent with this Court's decision in *Barzee*, ordered the immediate medication of Barzee. *See Barzee Petition, Exhibit A*. On February 12, 2008, Barzee's counsel filed a motion to stay the medication order on the ground that counsel intended to seek review of the *Barzee* decision in the United States Supreme Court. On March 6, 2008, the trial prosecutor opposed the stay on the ground that Barzee had failed to establish that a grant of certiorari was substantially likely. On March 7, 2008, the trial court denied the motion for stay and again ordered the immediate medication of Barzee as authorized by this Court. *See Petition, Exhibits B, D & E*.

4. On March 11, 2008, Barzee filed a petition for extraordinary relief pursuant to Rule 19, Utah Rules of Appellate Procedure, seeking a stay of the medication order while Barzee sought United States Supreme Court certiorari review. *See Petition at 2*. In the last paragraph of the petition, Barzee asserted that an "emergency" grant of the petition was necessary because the "Utah State Hospital has stated its intention to immediately begin medicating Ms. Barzee by force if necessary." *See Petition at 7*.

5. Rule 19 directs that a petition that requests "emergency relief" must comply with the requirements of Rule 8A. *See Utah R. App. P. 19(b)(9), (c), & (d)*. Rule 8A(c) directs that "a defendant in a criminal case originally charged as a felony" who files a petition requesting emergency relief must serve "the Appeals Division of the Office of the Utah Attorney General." In this case, Barzee did not serve the Appeals Division. Instead, Barzee served an assistant attorney general listed as agency counsel for the state hospital, whose

office is located at a different address than the Appeals Division, and who has never been the attorney of record in this case either in the trial court or on appeal.

6. In addition to Rule 8A, Utah Code Ann. § 67-5-1(2) (West 2007) authorizes only the Attorney General to “attend the [Utah] Supreme Court” on behalf of the State in appellate proceedings arising out of felony prosecutions. This exclusive authority is well-recognized by the criminal defense bar and the state appellate courts. In prior appellate court proceedings in this case, Barzee regularly served the Appeals Division of the Attorney General’s Office. But Barzee served the instant petition on the trial prosecutor, a deputy district attorney with no authority to appear or respond in this Court on behalf of the State, and on counsel for the State Hospital, an assistant attorney general who has never been attorney of record for the State in this case.

7. Rule 19(c) provides that when a petition is filed, “[t]he judge, agency, person, or entity and all parties in the action other than the petitioner shall be deemed respondents for all purposes” and directs that a response to the petition be filed within seven days of service. If the petition seeks emergency relief, rule 8A(d) supersedes rule 19(c), and the response time is shortened to three days “or whatever shorter time the appellate court may fix.” In this case, Barzee did not request, and the Court did not order, an expedited response.

8. Rule 8A(f) directs that “[n]o petition for emergency relief will be heard without the presence of an adverse party except on a showing that the party (1) was served with reasonable notice of the hearing, and (2) cannot be reached by telephone.” In this case, the

Appeals Division was not served and members of the Division were available by telephone.

9. At approximately 4:20 p.m., a justice of this Court provisionally granted Barzee's petition and stayed the medication order. Shortly after 5:00 p.m., undersigned counsel informally learned that a stay may have been issued and immediately telephoned Barzee's counsel, who confirmed that the petition had been provisionally granted.

* * *

Given the procedural irregularities which occurred in the provisional grant of Barzee's petition, the short response time permitted by the rule, and the substantial interests at stake, an immediate hearing on the merits of the petition would best serve the interests of Petitioner, the State, and the other respondents.

DATED this 17th day of March, 2008.

MARK L. SHURTLEFF
Attorney General


CHRISTINE F. SOLTIS
Assistant Attorney General

CERTIFICATE OF DELIVERY

I hereby certify that a true and accurate copy of the foregoing REQUEST FOR ORAL ARGUMENT ON PETITION FOR EXTRAORDINARY WRIT was hand-delievered to DAVID FINLAYSON & SCOTT WILLIAMS, Attorneys for Petitioner Barzee, 43 East 400 South, Salt Lake City, Utah 84111, and BRENT JOHNSON, Administrative Office of the Courts, attorney for Respondent Judge Atherton, 450 South State Street, 3rd Floor, PO Box 140241, Salt Lake City, UT 84114, this 17th day of March, 2008.


